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IN THE
United States Supreme Court
OCTOBER 1983 TERM

OLTRADO MICHAELANGELO LISOTTO,
Petitioner (Appellant Below)

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below)

JOHN JAMES PELLA,
Petitioner (Appellant Below)

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government established by independent evidence that Petitioners participated in a conspiracy.

2. Whether admission of the coconspirators' statements violated Petitioners' Sixth Amendment Right of Confrontation.

3. Whether there existed sufficient evidence to establish beyond a reasonable doubt Petitioners' knowing participation in a conspiracy.

4. Whether the erroneous admission of the airline ticket evidence was so prejudicial as to require a mistrial.

5. Whether the Petitioners were entitled to sever their trials when the two codefendants who were the chief coconspirators were tried in absentia.

6. Whether the District Court sentenced Petitioner Pella based upon inaccurate and unreliable information contained in the presentence report.

PARTIES

The only parties to this action are those named in the case caption, Oltrado Michaelangelo Lisotto and John James Pella (Petitioners, Appellants Below), and the United States of America (Respondent, Appellee Below).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case has been published in official form and is reproduced in the Appendix to this petition. *United States of America v. Oltrado Michaelangelo Lisotto,* No. 82-5329, *United States of America v. John James Pella,* No. 82-5333, 722 F.2d 85 (4th Cir. 1983).

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered on the 1st day of December, 1983. A motion for rehearing was denied on the 28th day of December, 1983.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1254 to review the judgment by writ of certiorari granted upon timely petition of a party (here, Oltrado Michaelangelo Lisotto and John James Pella, Appellants Below).

The judgment of the United States Court of Appeals for the Fourth Circuit is final with respect to the issues presented in this petition. The appellate court's judgment is ripe for review at this time.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioners John James Pella and Oltrado Michaelangelo Lisotto were indicted on July 27, 1982, on three counts: conspiracy to distribute marijuana in violation of 21 U.S.C. § 841(a)(1); interstate travel to promote illegal activity in violation of the Travel Act, 18 U.S.C. § 844(a). Also indicted were codefendants U.S.C. Section 844(a). Also indicted were codefendants Jerry Dennis Bishop and Jerry Shocket. A jury trial was held on October 13, 14 and 15, 1982, before The Honorable J. Calvitt Clarke, Jr. in the United States District Court for the Eastern District of Virginia, Norfolk Division. Mr. Bishop and Mr. Schocket were tried in absentia. The court entered a judgment of acquittal on the cocaine possession count for Mr. Pella and Mr. Lisotto. The jury acquitted the Petitioners on the Travel Act count and convicted them on the conspiracy to distribute marijuana charge. Mr. Bishop and Mr. Schocket were convicted of all three charges. On November 23, 1982, the court sentenced Mr. Pella to twelve years in prison and Mr. Lisotto to four years under the enhancement provision of 21

U.S.C. § 841(b)(6) involving quantities of marijuana in excess of 1,000 pounds.

The evidence presented at trial established that in early July of 1982, an informant for the Drug Enforcement Agency, Jack Rakar, met with Mr. Bishop in Seattle, Washington and Miami, Florida to discuss the transportation of marijuana by Mr. Rakar, a pilot. Acting upon instructions from government agents, Mr. Rakar phoned Mr. Bishop on July 14, 1982 and informed him that a load of marijuana was being flown into the country. Mr. Bishop expressed interest in buying the marijuana, and the two arranged a meeting in Norfolk, Virginia. On July 17, 1982, Mr. Rakar picked up Mr. Bishop at the Norfolk airport and drove him to Horne's Coliseum Inn in nearby Hampton. Posing as the marijuana importer and seller, Special Agent James of the Drug Enforcement Agency called Mr. Bishop the next day to negotiate a sale of marijuana. On July 19, 1982, Agent James and Agent Gutensohn met with Mr. Bishop at the Coliseum Inn restaurant, and they agreed to sell 2,700 pounds of marijuana to Mr. Bishop for $370,000.

At Mr. Bishop's request, Mr. Rakar drove to the Sheraton Inn in Norfolk to pick up Mr. Schocket and bring him back to Mr. Bishop's hotel room on July 19, 1982. Mr. Schocket then went downstairs to meet the agents. Agents James and Gutensohn drove Mr. Schocket to Portsmouth, Virginia to show him the truckload of marijuana supposedly for sale. Mr. Schocket expressed interest in purchasing the entire load which consisted of 4,600 pounds. On the way back to the Coliseum Inn, Mr. Schocket told the agents that the money to purchase the marijuana would come from Pittsburgh and that he would call "his people" to make the financial arrangements.

The telephone toll records for Mr. Bishop's hotel room established that on July 19, 1982, between approximately 3:15 p.m. and 9:20 p.m., 19 long distance calls were placed. Two of the calls were to Mr. Pella's residence in Pittsburgh, each of a brief duration. A third call was placed to an unknown telephone number in Pittsburgh. Sixteen other calls were made to the Seattle area, the Miami area, the Los Angeles area and to the Norfolk/Richmond area. During Mr. Bishop's stay at the Coliseum Inn, other long distance calls were made from his telephone, but none were to the Pittsburgh area.

On the morning of July 20, 1982, Agent Gutensohn called Mr. Bishop who told him that the money to purchase the marijuana would arrive in Norfolk that afternoon. Surveillance by government agents at the Pittsburgh and Norfolk airports established that Mr. Pella and Mr. Lisotto flew from Pittsburgh to Norfolk at 12:30 p.m. the same day. Mr. Pella carried a shoulder bag. Upon arrival in Norfolk, they went to the Sheraton Inn where Mr. Schocket was staying. At 3:40 p.m., Mr. Bishop called the informant, Mr. Rakar, to discuss flying 1,000 pounds of marijuana to Pittsburgh. Mr. Bishop mentioned that one of the people from Pittsburgh was a pilot who would accompany Mr. Rakar.

In the late afternoon on July 20, 1982, Agents James and Gutensohn went to the Sheraton Inn lounge to finalize the transaction. They saw Mr. Lisotto in the lounge talking with a woman. He was joined by Mr. Pella, and they sat at a table near the entranceway. At some point Messrs. Pella and Lisotto left the lounge, but there was no evidence concerning when they departed.

After the government agents had been sitting in the lounge for a while, Agent Gutensohn walked into the

lobby, saw Mr. Bishop approaching and waved to him. They went into the lounge together. Mr. Bishop told the agents that the money had arrived and they agreed upon the terms of the transaction: 4,600 pounds of marijuana for $609,000. Mr. Bishop explained that he was going to return to Mr. Schocket's hotel room to freebase cocaine and that Mr. Schocket would bring down the money.

Mr. Schocket then came into the lounge with a brown paper bag. Inside was $59,000 in a plastic bag from a local clothing store. When Mr. Schocket went with Agent Gutensohn into the men's room to transfer the money, Mr. Schocket was arrested. Local police officers immediately proceeded to Mr. Schocket's hotel room and there arrested Messrs. Bishop, Pella and Lisotto.

In Mr. Bishop's portfolio were two slips of paper containing various names and flight information, including Mr. Pella's home telephone number. A piece of paper found on Mr. Pella contained the hotel telephone numbers for Messrs. Bishop and Schocket. Mr. Lisotto had his pilot's license and a piece of paper with information on the Pittsburgh to Norfolk flight, the hotel telephone number of Mr. Bishop and the names Frank and Harry List.

During the trial, a government agent testified that after Messrs. Pella and Lisotto boarded the plane in Pittsburgh he asked the airline employee who collected the tickets for copies of the tickets given by Petitioners, whom he described to the employee. The agent further testified that the tickets had been issued in the names of F. List and H. List, although the government did not introduce the tickets themselves. The district court subsequently struck the evidence but refused to grant a mistrial.

ARGUMENT

ISSUE I

It is well-settled that coconspirators' out-of-court statements are admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence only if the government establishes that a conspiracy existed and that the defendant participated in the conspiracy by a fair preponderance of independent, nonhearsay evidence. *United States v. Gresko,* 632 F.2d 128, 1131 (4th Cir. 1980). The courts have stressed that the independent evidence cannot include out-of-court statements by the alleged coconspirators; "[o]therwise hearsay would lift itself by its own bootstraps to the level of competent evidence." *Ibid.*, citing *Glasser v. United States,* 315 U.S. 60, 74-75 (1942).

Petitioners did not challenge on appeal the district court's finding that a conspiracy between Mr. Bishop and Mr. Schocket existed. But this concession did not relieve the government of its burden to prove Petitioners had knowledge of the conspiracy's purpose and participated in it, *United States v. Laughman,* 618 F.2d 1067, 1076 (4th Cir.), *cert. denied,* 447 U.S. 925 (1980). The extent of Petitioners' participation may be slight, *United States v. Seni,* 455 U.S. 950 (1982), but the government must still prove that participation by a fair preponderance of evidence to the judge (and beyond a reasonable doubt to the jury). *United States v. Laughman, supra,* at 1076, citing *United States v. Dunn,* 564 F.2d 348, 356-57 (9th Cir. 1977). In this case, the government alleged that Petitioners knowingly participated by bringing the money from Pittsburgh to Norfolk, but could not prove it by independent evidence at any point in the trial.

The Fourth Circuit listed the following as independent evidence sufficient to permit the government to introduce

coconspirators' statements and sufficient to sustain Petitioners' convictions: (1) The record indicated that Mr. Bishop did not have the money to buy the marijuana when he first offered to purchase it; (2) Two phone calls were then made from Mr. Bishop's hotel room to Mr. Pella's home telephone number in Pittsburgh; (3) Within hours of these calls Petitioners traveled from Pittsburgh to Mr. Schocket's hotel; (4) The money was delivered on the afternoon of Petitioners' arrival; (5) Both were within sight of Mr. Bishop's and the government agents' final negotiations for the drugs; (6) Petitioners were arrested in Mr. Schocket's room immediately following the drug transaction; (7) The papers seized from Petitioners linked them to Messrs. Bishop and Schocket.

This list of independent evidence, which is the foundation for the Fourth Circuit's affirmance of Petitioners' convictions, suffers from two weaknesses: the court drew unwarranted inferences from the evidence concerning Petitioners' presence in the hotel lounge and concerning when Messrs. Bishop and Schocket obtained the purchase money, and the court failed to examine other evidence within the context of the complete record.

There was absolutely no testimony at trial that Petitioners were in sight of the negotiations conducted in the hotel lounge between Mr. Bishop and the agents. The government made no effort to put the events occurring in the lounge in any proper time sequence. The agents never testified when they saw Petitioners in the lounge in relation to Mr. Bishop's or Mr. Schocket's activities.[1] The issue is an

[1]In the Fourth Circuit opinion, the court assumed in its recital of facts that Petitioners followed Mr. Bishop back to the hotel room after he had concluded the negotiations with the agents. The assumption has no evidentiary basis from the record and formed one basis for the petition for rehearing.

important one in light of cases affirming convictions for distributing controlled substances based upon evidence that the defendant monitored or watched the drug transaction from a distance. *See, e.g., United States v. Dockins,* 659 F.2d 15 (4th Cir. 1981) (defendant conversed in the lobby of a hotel with a codefendant while the sale of drugs was being conducted in a hotel room where the codefendant gestured towards the hotel room during the conversation).

Concerning when and how Messrs. Bishop and Schocket obtained the $59,100, although they may have told the agents they did not have the money on July 19, 1982, no evidence independent of these out-of-court statements established this fact. Even though the agents did not see the money until the folllowing day, July 20, 1982, no one could testify that Mr. Bishop or Mr. Schocket did not have the money before the Petitioners arrived. The agents had not conducted any type of search to establish that there was no money in their rooms, and Agent James conceded that it was "very normal" for drug purchasers to conceal the true source of their purchase money to avoid being robbed.

The remaining independent evidence relied upon by the Fourth Circuit reflected nothing more than association by Petitioners with the conspirators, Messrs. Bishop and Schocket, and mere presence is insufficient to establish by a preponderance of evidence that Petitioners participated in the drug conspiracy. *United States v. Dominguez,* 604 F.2d 304, 309 (4th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980). Someone from Mr. Bishop's room called Mr. Pella's residence twice and another Pittsburgh number once. The calls were brief and their importance dwarfed by the number of other long-distance calls made during the same time period (36 before the money appeared). These calls

were not recorded, so even assuming that Mr. Pella spoke with Mr. Schocket or Mr. Bishop, there is no evidence that arrangements were made for money to be obtained. Petitioners flew from Pittsburgh to Norfolk, and Mr. Pella carried a shoulder bag. There is nothing to indicate that he concealed money inside. The money brought by Mr. Schocket was in a plastic bag from a local Virginia clothing store, and no fingerprints were found on the bag or the money. Mr. Pella and Mr. Lisotto visited the hotel lounge and then were found in Mr. Schocket's room at the time of the arrest. But there was no evidence that Petitioners saw or knew about the money. No empty shoulder bag like the one Mr. Pella had carried was found in the room.

The documentary evidence introduced simply corroborated the fact that Petitioners had arranged to visit Mr. Schocket and Mr. Bishop in Norfolk. Mr. Bishop's portfolio contained paper with Mr. Pella's telephone number. However, that piece of paper and other papers in the portfolio contained other names, flight information, names and clothing descriptions, none of which implicated Mr. Pella or Mr. Lisotto. The papers could easily support an inference that someone else brought the money, if Mr. Bishop and Mr. Schocket didn't already have it with them. The slip of paper found on Mr. Pella had written on it Mr. Bishop's and Mr. Schocket's telephone numbers. Mr. Lisotto's paper contained Mr. Bishop's phone number and flight information on the Pittsburgh/Norfolk flight. None of the papers pertained to the $59,100 Petitioners are accused of transporting.

Where the Fourth Circuit has upheld the admission of coconspirators' statements in other cases, the evidence showed a much greater degree of complicity than in the in-

stant case, such as actual contact with the drugs, conferences with a coconspirator immediately prior to a sale or actual participation in drug negotiations. *See, e.g., United States v. Seni,* 662 F.2d 277 (4th Cir. 1981), *cert. denied,* 455 U.S. 950 (1982) (defendants driving vans which contained marijuana residue, heading towards a marina where the unloading of marijuana was taking place, and giving implausible explanations to the police about the destination when stopped at a roadblock); *United States v. Dockins,* 659 F.2d 15 (4th Cir. 1981) (seller of cocaine stopped by defendant's house on the way to the sale; defendant followed seller to a hotel, both pulling off the road en route to confer; defendant waited in lobby, talking with another conspirator who pointed to a hotel room where the transaction was taking place); *United States v. McCormick,* 565 F.2d 286 (4th Cir. 1977), *cert. denied,* 434 U.S. 1021 (1978) (procurer of drugs met with defendant in car for ten minutes before procurer sold agent the drugs on two separate occasions; each time, procurer was seen handling something while in the car); and *Joyner v. United States,* 547 F.2d 1199 (4th Cir. 1977) (defendant arrived at transaction site with drug carrier and participated in negotiations).

The government failed to meet its burden of producing "substantial, independent evidence, at least enough to take the question to the jury," *United States v. Nixon,* 418 U.S. 683, 701 n. 14 (1974). Petitioners were entitled to a directed verdict of acquittal and their convictions should have been reversed by the Fourth Circuit.

ISSUE II

This Court, in *Dutton v. Evans,* 400 U.S. 74, 86 (1970)., held that before the government may introduce hearsay statements made by a coconspirator, it must demonstrate the unavailability of the declarant and some indicia of reliability of the statements. This Court listed four factors relevant to assessing the reliability of the hearsay statements:

> (1) whether the declaration contained assertions of past fact;
>
> (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime;
>
> (3) whether it was possible that the declarant was relying upon faulty recollection; and
>
> (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

See also Ohio v. Roberts, 448 U.S. 56, (1980).

The Fourth Circuit held that the statements by Messrs. Bishop and Schocket contained indicia of reliability because they were against penal interest and further established the speakers' complicity in the conspiracy. The record established that Messrs. Bishop and Shocket had already implicated themselves thoroughly as coconspirators to the agents before they mentioned other participants in Pittsburgh. The inclusion of two more conspirators in their ring did not subject them to further risk of criminal penalty.

The Fourth Circuit failed to consider the fourth factor listed by this Court in *Dutton v. Evans, supra,* and recognized by other courts in criminal conspiracy cases: Alleged coconspirators often have motives to misrepresent the participation of another person. In *United States v. Gibbs,* 703 F.2d 683 (3d Cir. 1983), the court suggested that a conspirator, Quintiliano, may have lied about the defendant's involvement in a marijuna conspiracy in order to reassure other coconspirators that plans were proceeding smoothly. 703 F.2d at 693. Quintiliano may have also misrepresented that the defendant was an interested purchaser of marijuana to exact better terms from other prospective purchasers. *Ibid.*

Similar considerations were present in this case. Messrs. Bishop and Schocket had several motives for lying about Petitioners' involvement in their scheme: (1) to conceal their real source of funding; (2) to guard against having their money stolen from their hotel room, a common practice as conceded by Agent James at trial; or (3) to create the impression they had widespread connections with which to market the large amount of marijuana they wanted to buy from the agents to assure the agents they could pay the balance of the purchase price. Messrs. Bishop and Schocket may have simply been overconfident that Petitioners would agree to participate in transporting the marijuana after coming to Norfolk to discuss the proposition.

Recalling that the statements made by Messrs. Bishop and Schocket were not corroborated nor made in Petitioners' presence, *see United States v. Brown,* 667 F.2d 566, 568 (6th Cir. 1982), the Fourth Circuit's holding that the admission of these statements did not violate Peti-

tioners' Sixth Amendment right of confrontation should be reversed.[2]

ISSUE III

To sustain Petitioners' convictions, the government was required to prove beyond a reasonable doubt that Mr. Pella and Mr. Lisotto had knowledge of the conspiracy's purpose and some action indicating their participation. *United States v. Laughman, supra,* 618 F.2d at 1078. And it is an axiom that association with the conspirators does not transform a person into a conspirator even if he knows of the conspiracy. *United States v. Grassi,* 616 F.2d 1295, 1301 (5th Cir.), *cert. denied,* 449 U.S. 956 (1980), citing *United States v. Falcone,* 311 U.S. 205 (1940). The proof must be individual and personal. *United States v. Prince,*

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[2]The Fourth Circuit decided this issue without addressing a threshold issue: whether a coconspirator' statement admissible under Rule 801(d) (2) (E) of the Federal Rules of Evidence is automatically considered to be reliable under the Confrontation Clause. *See, e.g., Ohio v. Roberts,* 448 U.S. 56, 66 (1980). The circuits have split on this issue. The Third, Ninth, Second and Eighth Circuits make a separate determination under the Confrontation Clause of the reliability of coconspirators' statements already admissible under the Federal Rules of Evidence. *United States v. Ammar,* 714 F.2d 238 (3d Cir.), *cert. denied,* 104 S.Ct. 344 (1983); *United States v. Perez,* 658 F.2d 654, 660 & n. 5 (9th Cir. 1981); *United States v. Wright,* 588 F.2d 31, 37-38 (2d Cir. 1978); *cert. denied,* 440 U.S. 917 (1979); *United States v. Singer,* 660 F.2d 1295, 1307 (8th Cir. 1981), *cert. denied,* 454 U.S. 1156 (1982) (case-by-case analysis). The Seventh, First, Sixth and Fifth Circuits render no separate determination, holding that Confrontation Clause concerns of reliability are satisfied if a coconspirator's statement is admissible under the rules. *United States v. Papia,* 560 F.2d 827, 836 n. 3 (7th Cir. 1977); *Ottomano v. United States,* 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied,* 409 U.S. 1128 (1973); *United States v. McManus,* 560 F.2d 747, 750 (6th Cir. 1977), *cert. denied,* 434 U.S. 1047 (1978). The Fourth Circuit followed the latter interpretation in *United States v. Lurz,* 666 F.2d 69, 81 (4th cir. 1981), *cert. denied,* 455 U.S. 1005 (1982).

515 F.2d 564, 567 (5h Cir.), *cert. denied,* 423 U.S. 1032 (1975). Examining the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60 (1942), the circumstantial evidence did not show Petitioners' knowledge and participation even with the coconspirators' statements. The small increment in probative evidence gained from the statements of Mr. Bishop and Mr. Schocket did not rise to the higher directed verdict standard. There is still no evidence that Petitioners brought money from Pittsburgh. Mr. Schocket and Mr. Bishop may have led the agents to believe the money was arriving from Pittsburgh, but as Agent James conceded, purchasers often give misinformation to protect themselves. The Fourth Circuit recognized this problem of relying upon conspirators' statements in drug transactions in *United States v. Stroupe,* 538 F.2d 1063, 1065 (4th Cir. 1976).

Mr. Schocket also may have wanted Petitioners to help transport and store the marijuana in Pittsburgh as he indicated to the agents, but those statements alone do not permit an inference that Petitioners agreed to help. Even if they had come down to discuss the proposition with Mr. Schocket and Mr. Bishop (but no evidence to that effect exists), no evidence indicated they had agreed. *See United States v. Cianchetti,* 315 F.2d 584, 588 (2d Cir. 1963) (defendant discussed possibility of entering drug distribution conspiracy but declined due to deportation problems). Mr. Lisotto and Mr. Pella did not fly in to Norfolk until 2:50 p.m. and were arrested shortly after arriving at the hotel.

The statements also do not have any indicia of reliability. They were not made in the presence of Petitioners. They were vague references to Pittsburgh and "my people". Although Mr. Bishop and Mr. Schocket were very

candid to the agents about their relationship with each other, they never mentioned Mr. Pella or Mr. Lisotto by name.

Therefore, the Fourth Circuit's holding finding sufficient evidence to sustain Petitioners' convictions is erroneous and should be reversed.

ISSUE IV

The government attempted to prove that Petitioners traveled to Norfolk using aliases by having a government agent testify that he looked at two tickets given to him by an airline employee and that those tickets had F. List and H. List printed on them. The agent's testimony, admitted over strenuous objection by Petitioners, violated Federal Rules of Evidence 1002 and 1003 which require that the contents of a writing must be proved by the original writing, or a copy if the originals have been destroyed. Oral testimony concerning the contents of a writing is permitted only if the writing has been lost or destroyed. In this case, the agent testified that copies of the tickets were at the Pittsburgh offices of the Drug Enforcement Agency.

The government also circumvented Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure by eliciting the contents of the airline tickets without producing them for Petitioners' counsel. This rule requires the government to permit a defendant to inspect all documents or tangible objects which are intended for use by the government as evidence in chief. Whether the tickets would be introduced into evidence was a determining factor in many of counsel's strategic decisions, particularly the decision whether or not to have Petitioners testify. Therefore, production of the tickets was an important procedural right to which Petitioners were entitled.

When the district court, upon reconsideration, agreed that the agent's testimony had been improperly admitted, it refused to grant a mistrial and instead gave a cautionary instruction to the jury to disregard the testimony. The jurors could not have been expected to wipe this highly relevant information from their minds with a simple instruction. Not only could the tickets be evidence that Petitioners had knowledge of the illegal activity in Norfolk, but the tickets were corroborated by Mr. Lisotto's piece of paper on which the names Frank and Harry List appeared. Without the tickets, the names were meaningless to the jury. The jury's inability to erase important information has been recognized by courts when the government has introduced coconspirators' statements which did not come within the exception. *Cf. United States v. Bell,* 573 F.2 1040, 1043 (5th Cir. 1978) (en banc) (if court determines government has failed to carry burden of proof, court will declare a mistrial, unless a cautionary instruction would suffice to cure any prejudice).

Where the evidence is of such an "exceptionally prejudicial character" that a cautionary instruction would be ineffective in removing the harmful effect on the jury, a defendant is entitled to a new trial. *United States v. Green,* 400 F.2d 847, 848 (6th Cir. 1968), citing *Dolan v. United States,* 218 F.2d 454 (8th Cir. 1955). The agent's testimony concerning the airline tickets was exceptionally prejudicial, and the above-cited holding should apply.

The Fourth Circuit's holding that this issue lacked merit is erroneous and should be reversed.

ISSUE V.

Although Rule 14 of the Federal Rules of Criminal Procedure places the decision to grant or deny a motion to

sever within the discretion of the trial court, severance is required if "a substantial degree of prejudice" would result from a joint trial. *United States v. Shuford,* 454 F.2d 772, 776 (4th Cir. 1971). As the *Shuford* court observed:

> Notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial

Ibid.

Petitioners did not receive a fair trial due to a combination of two factors: their codefendants were tried in absentia while a disparity of evidence existed between the minimal, circumstantial evidence introduced against Petitioners and the overwhelming, direct evidence against the two absent codefendants.

Where a defendant is tried jointly with his alleged coconspirators who, according to the evidence, had much greater involvement, the courts have recognized the danger that guilt will be transferred from the coconspirators to the defendant irrespective of the actual evidence. *United States v. Sampol,* 636 F.2d 621, 645 (D.C. Cir. 1980); *United States v. Mardian,* 546 F.2d 973, 977 (D.C. Cir. 1976).

The Assistant U.S. Attorney admitted that Mr. Schocket and Mr. Bishop were the chief coconspirators in the case. All the direct evidence focused on Mr. Bishop and Mr. Schocket because the agents and the informant dealt exclusively with them: their telephone conversations werer taped; they inspected the marijuana; and they handed over the money. In contrast, the evidence against Petitioners is purely circumstantial. The agents and the informant never spoke with them; they were never seen with money or drugs. The evidence against Petitioners was so

slight that any risk of guilt transference from Mr. Bishop and Mr. Shocket was too great to insure petitioners had a fair trial.

The danger of guilt transference from the large amount of evidence against the missing codefendants was heightened by the fact that the codefendants were tried in absentia. Despite cautionary instructions by the district court, the jury most likely drew an unfavorable inference with respect to Petitioners from the absence of Messrs. Bishop and Schocket, as did the district judge at a later bond revocation hearing when he commented that he could not disregard the possibility that the absence of Messrs. Bishop and Schocket was part of a design between the four codefendants.

At least one circuit court has recognized that where the chief coconspirator is absent the remaining defendants cannot receive a fair trial. In *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981), six defendants were charged with conspiring in violation of the Racketeer Influenced and Corrupt Organizations Act. The central figure was a state court judge and the other defendants were court employees, attorneys and others who participated with the judge in bribery, manipulation of the grand jury, threatening witnesses and other obstructions fo justice. During the trial, the judge became ill and his case was severed. However, the appellate court found that he had, in effect, been tried in absentia because the jury had been told to consider his participation in the conspiracy during their deliberations and the same jury later heard the remainder of the judge's trial when he recovered. Reversing the codefendants' convictions, the court stated:

> [O]ur careful review of the record in this case convinces us that the absence of Judge Smith

> prejudiced the effective presentation of the remaining coconspirators' defenses. Because Smith was such a central figure in the conspiracy, allowing the government to try Smith *in absentia* abridged not only Smith's rights, but, under the facts of the case at bar, also abridged the rights of his coconspirators. The entire trial was thus tainted by the bifurcated trial procedure adopted in this case.

649 F.2d at 1083.

The Second Circuit has held a defendant is not prejudiced by having a codefendant tried in absentia, *United States v. Lobo,* 516 F.2d 883 (2d Cir.), *cert. denied,* 423 U.S. 837 (1975); *United States v. Cianchetti,* 315 F.2d 584 (2d Cir. 1963), but neither opinion addressed the pertinent question here: whether the disparity of evidence between the absent codefendants and the remaining codefendants would impair the jury's ability to deliberate impartially.

Severence would not have been unduly burdensome on the government. The trial only lasted three days. Almost all of the witnesses were government agents so that the government's case would not have been jeopardized or seriously inconvenienced by delaying Mr. Bishop's and Mr. Schocket's trial. Cf. *United States v. Benavides,* 596 F.2d 137, 140 (5th Cir. 1979). Two witnesed who testified about the hotel phone records lived in the area. The informant apparently cooperated with the government on other cases and was in no way an unwilling witness. *See, e.g., United States v. Peterson,* 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 424 U.S. 925 (1976) (trial in absentia proper where government's chief witness and potential accomplice was vascillating on testifying). If the government had been anxious about preserving testimony, since it was unclear when the missing defendants would have been ap-

prehended, it could have tried them in absentia immediately after Petitioners' trial. Alternatively, the government could have tried Petitioners on their original trial date (when the codefendants' absence first came to light) instead of requesting that the district court continue the trial for over a week to investigate the disappearances. All of the witnesses were present on that date, and Petitioners were prepared to go to trial.

The Fourth Circuit erred in holding that Petitioners' claim of prejudice was without merit, and it should be reversed. The evidence being slim and circumstantial against Petitioners, they deserved a scrupulously fair trial.

ISSUE VI

There are constitutional limitations to a federal district judge's right to conduct a broad inquiry into a defendant's character and background for sentencing purposes. One of these limitations is a defendant's due process right to be sentenced only on information which is accurate. *United States v. Lee,* 540 F.2d 1205, 1210 (4th Cir.), *cert. denied,* 429 U.S. 894 (1976), citing *Townsend v. Burke,* 334 U.S. 736 (1948); *accord: United States v. Howard-Arias,* 679 F.2d 363, 367 (4th Cir. 1982), *cert. denied,* 103 S.Ct. 165 (1983).

Mr. Pella's presentence report stated that many of his past associates had connections with organized crime and had serious criminal histories. At the sentencing hearing held November 23, 1982, Mr. Pella's counsel requested that this statement be stricken since the allegation was so nebulous that Mr. Pella could not rebut the charge. The district court simply noted the objection for the record and sentenced Mr. Pella to twelve years imprisonment, stating that the primary consideration was his past criminal

record. However, at a subsequent hearing on Mr. Pella's bond reduction motion held January 12, 1983, the district court refused to reduce the bond based upon the presentence report's allegation, reasoning that Mr. Pella's so-called organized crime connections could raise enough money for him to flee. Thus, the district court judge clearly accepted the veracity of the presentence report's accusation and found it significant.

The presentence report claimed that Mr. Pella had connections with organized crime without specifying the relationship or revealing the source of that information. Althouth Mr. Pella objected to that portion of the presentence report, his denial alone was insufficient to remove any possible taint. He could not rebut such a broad allegation by proving the converse: that he had no connection with organized crime. Only if the presentence report had contained the factual foundation for the charge, could Mr. Pella have had a genuine opportunity to counter the accusation.

The Second Circuit, which addressed the dangers of presentence reports containing unattributed accusations of organized crime connections, decided that due process guarantees prohibited the sentencing judge from considering such allegations unless the government revealed the source of the accusations, or, if there was good cause for the source's nondisclosure, unless the government presented sufficient corroboration of the allegation. *United States v. Fatico,* 579 F.2d 707, 713 (2d Cir. 1978), *affd. after remand,* 603 F.2d 1053 (1979), *cert. denied,* 444 U.S. 1073 (1980). The *Fatico* court understood that merely giving the defendant an opportunity to deny the allegation is insufficient to protect his or her due process rights. Instead, the government had the burden of supporting its accusations.

In this case, the presentence report made the bare allegation that Mr. Pella had organized crime connections. When Mr. Pella denied the veracity of the charge, the court simply noted his denial. It did not require the government to either reveal the source of that information or present corroboration. The unreliability of this information is apparent when this Court considers that the government also represented to the court that upon arrest Mr. Lisotto was found with a notebook containing the telephone numbers of known drug dealers. The district court initially accepted this representation, but at an evidentiary hearing held later, the government could not substantiate its allegations.

The Fourth Circuit's assessment that this issue lacks merit is erroneous and Petitioner Pella's sentence should have been vacated to permit him to be resentenced before another district judge.

CONCLUSION

For all the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and should resolve these issues which are of fundamental importance to the criminal justice system.

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APPENDIX A

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5329

United States of America,

Appellee,

v.

Oltrado Michaelangelo Lisotto,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause, be, and the same is hereby, affirmed.

/s/William K. Slate II
Clerk

FILED
Dec. 1, 1983
U.S. Court of Appeals
Fourth Circuit

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5333

United States of America,

Appellee,

v.

John James Pella,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
CLERK

* FILED
Dec. 1, 1983
U.S. Court of Appeals
Fourth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5329

United States of America,

Appellee,

v.

Oltrado Michaelangelo Lisotto,

Appellant.

No. 82-5333

United States of America,

Appellee,

v.

John James Pella,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. CR 82-98-N

Argued: October 7, 1983 Decided: December 1, 1983

Before HALL and CHAPMAN, Circuit Judges; and BUTZNER, Senior Circuit Judge

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William B. Cummings for Appellant Lisotto; Stanley E. Preiser (Frederick D. Fahrenz, Jeffrey K. Matherly, Sherri D. Goodman, Preiser & Wilson, Legal Corporation on brief) for Appellant Pella; Raymond A. Jackson, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

Oltrado Michaelangelo Lisotto and John James Pella appeal from their jury convictions of conspiring to possess marijuana in violation of 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

I.

On the morning of July 19, 1982, DEA agents, posing as drug dealers, met with Jerry Bishop at Horne's Coliseum Inn outside Norfolk, Virginia, and discussed the sale of approximately 2,700 pounds of marijuana for $370,000. The agents then left the Coliseum Inn to inspect the marijuana. Upon inspecting the marijuana, Schocket indicated that he wanted to buy the entire allotment of 4,700 pounds, rather than the lesser amount previously discussed. Schocket and the agents then returned to the Coliseum Inn and met with Bishop.

Bishop stated that he wanted to buy all the marijuana, and that although he did not then have the purchase money, he expected to have it the following day. Meanwhile, Schocket went to Bishop's hotel room and placed several phone calls. Telephone toll records for Bishop's room showed that three long distance calls were made to the Pittsburgh, Pennsylvania, area. Two of these calls were made to appellant Pella's home. When Schocket returned from Bishop's room he confirmed to the agents that he and Bishop would have the money the next day.

The following morning, on July 20, DEA agents in Pittsburgh, Pennsylvania, observed appellants Pella and Lisotto, a licensed pilot, board a commercial flight for Norfolk, Virginia. Pella was carrying a shoulder bag; Lisotto did not carry any baggage. Upon arrival in Norfolk that afternoon, Pella and Lisotto took a taxi to the Sheraton Inn, where Schocket was staying.

Later that same afternoon government agents met with Bishop in the lounge of the Sheraton Inn. When this meeting began, the agents observed Lisotto on the other side of the lounge. Pella later joined Lisotto, and they moved to a table at the entranceway of the lounge. Bishop informed the agents that he had received the money to complete the transaction and that he would have Schocket bring it downstairs to them. Bishop then went up to Schocket's room. Pella and Lisotto followed him. When Schocket came downstairs with the money, he was arrested.

Bishop, Pella, and Lisotto were arested immediately afterwards in Schocket's hotel room. When Lisotto was arrested, the DEA agents seized from him his pilot's license and a slip of paper with Bishop's hotel telephone number. After arresting Pella, the DEA agents seized

from him a slip of paper containing the hotel telephone numbers of Bishop and Schocket. Following Bishop's arrest, and pursuant to a search warrant, the agents took from Bishop's belongings a slip of paper bearing Pella's home telephone number in Pittsburgh.

In July, 1982, Lisotto, Pella, Bishop, and Schocket were indicted for conspiracy to possess and distribute marijuana, interstate travel to promote an unlawful activity, and possession of cocaine. Although Bishop and Schocket were fugitives at the time of the trial, all co-defendants were tried before a jury in October, 1982. At trial, the district judge admitted certain out-of-court statements of Bishop and Schocket which implicated Pella and Lisotto in the conspiracy.[1] The trial judge ruled that these statements were admissible under Fed. R. Evid. 801(d)(2)(E)[2] because there was sufficient independent evidence to establish that Pella and Lisotto were members of the conspiracy.

Bishop and Schocket were convicted on all counts. Pella and Lisotto were found guilty only of the conspiracy charge. They now appeal these convictions.

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[1]These statements included Schocket's explanation that the money was coming from Pittsburgh, and that the marijuana would be flown to Pittsburgh, and Bishop's observation that one of the men coming from Pittsburgh was a pilot. Following Pella and Lisotto's flight into Norfolk, Bishop also informed the DEA agents that the people from Pittsburgh had arrived with the money.

[2]Pursuant to Fed. R. Evid. 801(d)(2)(E), a statement against a defendant is not hearsay if it is made "by a co-conspirator . . . during the course of and in furtherance of the conspiracy."

II.

Appellant's central contention on appeal is that the trial judge erred in admitting Bishop and Schocket's out-of-court statements about appellants because the independent evidence presented was insufficient to convict them. Appellants further contend that because Bishop and Schocket were not at the trial, the admission of these statements violated appellants' Sixth Amendment right to confront their accusors. We disagree.

Appellants initially argue that the evidence upon which the jury could rely to find appellants guilty beyond a reasonable doubt showed no more than appellants' mere association with their co-defendants. This contention, however, fails to consider the inculpatory nature of the independent evidence presented. The record indicates that Bishop did not have the money to buy the marijuana when he first offered to purchase it. Two phone calls were then made from Bishop's hotel room to Pella's home telephone number in Pittsburgh, and within hours Pella and Lisotto travelled from Pittsburgh and arrived at Schocket's hotel. The money was delivered on the afternoon of their arrival. Both were within sight of Bishop's and the DEA agent's final negotiations for the drugs. Both were arrested in Schocket's room immediately following the drug transaction. Upon their arrests, evidence was seized from both appellants linking them to Bishop and Schocket. These facts and all inferences that logically may be drawn from them were sufficient, apart from any hearsay, to support appellants' convictions. Given this independent evidence, the district judge did not err in admitting statements under the co-conspirator exception to the hearsay rule, and the jury was warranted in finding beyond a reasonable doubt that a conspiracy existed and that apepllants knew of it and joined in it.

Likewise, we find no merit in appellants' contention that admission of the statements at issue violated their Sixth Amendment rights. In *Ohio v. Roberts,* 448 U.S. 56 (1980), the Supreme Court identified two restrictions the Confrontation Clause places on the use of hearsay evidence in criminal trials. First, the prosecution generally must establish that the declarant is unavailable. Second, the statement may be admitted only if it bears adequate "indicia of reliability." *Id.* at 65.

In this case, the government has met both of the restrictions identified in *Ohio v. Roberts.* It is undisputed that the co-defendants were fugitives—and thus, unavailable—at the time of trial. Moreover, the statements were reliable because they were against the co-defendants' penal interest and further established their complicity in the conspiracy. Appellant's Sixth Amendment argument is therefore without merit.

III.

After a careful review of the record, we have determined that appellants' additional challenges to the judgment below are also without merit. For the foregoing reasons, we conclude that there was sufficient evidence to support the verdicts of guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Sherman,* 421 F.2d 198, 199-200 (4th Cir.), *cert. denied,* 398 U.S. 914 (1970). Accordingly, the convictions are affirmed.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5329

United States of America,

Appellee,

versus

Oltrado Michaelangelo Lisotto,

Appellant.

No. 82-5333

United States of America,

Appellee,

versus

John James Pella,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk, J. Calvitt Clarke, Jr., District Judge

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Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Chapman, and Judge Butzner.

For the Court,

/s/ William K. Slate, II
CLERK

END OF DOCKET